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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

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FILED
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JOHN F. DAVIS, CLERK

No. 594

LEGAL INTEGRITY PRESERVATION SOCIETY, INC., and HENRY G. BARTSCH, *Petitioners,*

v.

EUGENE X. MURPHY, REX K. NELSON and MARY V. BOWES, *Respondents.*

PETITIONERS' BRIEF IN REPLY TO MEMORANDUM OF EUGENE X. MURPHY AND REX K. NELSON, RESPONDENTS PRO SE

IRVIN LECHLITER
910 Seventeenth Street, N.W.
Washington, D. C. 20006
Attorney for Legal Integrity Preservation Society, Inc.

HENRY G. BARTSCH
3601 - 34th Street, N.W.
Washington, D. C. 20008
Pro Se

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The narrative statement constituting pages "1" and "2" of the only Respondent's Memorandum in Opposition is manifestly irrelevant to Questions "1", "2", "3", "4" and the Reasons presented in the Petition for Writ of Certiorari. It discloses no matter or ground why the cause should not be reviewed by this Court.

The Memorandum of Eugene X. Murphy and Rex K. Nelson, now Respondents *per se* and *pro se,* does not dispute these facts established by the record below in this cause:

1. That Eugene X. Murphy and Rex K. Nelson are Members of the Bar of the U.S. District Court for the District of Columbia, who practice law therein under the partnership name of "Murphy and Nelson".

2. That they entered into an agreement with Mary V. Bowes to institute and prosecute this litigation *in their own names as plaintiffs.*

3. That they agreed to pay the entire cost and expense of the litigation.

4. That their agreement absolved Mary V. Bowes of any obligation to repay them the costs and expenses of the litigation, regardless of its outcome.

5. That Murphy and Nelson did not have Mary V. Bowes assent to the agreement until May 10, 1966.

6. That Murphy and Nelson were on, May 10, 1966, informed of Jacob Wall's option of February 20, 1964 and of the contract of September 3, 1965 pursuant thereto; of Jacob Wall's supervening death on October 1, 1965; of Administration No. 116,909, Estate of Jacob Wall, deceased, in the Probate Division of the District Court; of paragraph "12" of Jacob Wall's Will, providing for devise of his prospective interest in 126 C Street, N.W. to the petitioner Henry G. Bartsch; and of the pendency of the application of Nathaniel Preston for appointment as Administrator, c.t.a. of the Estate of Jacob Wall on the date (June 28, 1966) when Murphy, Nelson and Michael Ritz, Jr., another at-

torney of Mary V. Bowes, prevailed upon her to execute a warranty deed for that property to Eugene X. Murphy and Rex K. Nelson.

7. That Murphy and Nelson's agreement with Mary V. Bowes provided that Murphy and Nelson would have the right to buy 126 C Street, N.W. from her *if they by litigation as plaintiffs pro se* could establish clear title to the property in Bowes' name.

8. That in the event the proposed law suit was unsuccessful in establishing clear title in Mary V. Bowes, Murphy and Nelson were under no obligation to pay her anything for the technical assignment of her interest *pendente lite.*

9. That no monetary consideration passed prior to June 8, 1966 when the petitioners filed their answers to the "complaint" of Eugene X. Murphy and Rex K. Nelson giving notice therein that the plaintiff's alleged "contract" was not "lawful, bona fide and enforceable" and that it afforded the plaintiff "no cause of action upon which the Court may grant them, or either of them, the relief they pray".

10. That Mary V. Bowes executed (and Murphy and Nelson recorded) a purported "warranty" deed for 126 C Street, N.W. on June 28, 1966, three weeks after service upon them of the petitioners' answers to the complaint. That for this warranty deed, Michael Ritz, Jr. (acting as attorney for Mary V. Bowes) accepted $500 and Murphy and Nelson's unsecured, unrecorded, promise to pay $21,000 additional—obviously unenforceable should the then pending litigation fail.

11. That the aforesaid $500 "consideration" was made by a Murphy and Nelson law firm check inscribed

with the date "April 22, 1966" thereby requiring Bowes to refund it (as the "deposit" identified in Murphy and Nelson's submitted "contract" offer of that date) should the pending litigation fail.

12. That Michael Ritz, Jr., entered his appearance in the Murphy and Nelson lawsuit on July 15, 1966 (three weeks after Bowes' delivery of a warranty deed) and made answer on behalf of Mary V. Bowes admitting all of the allegations of the complaint but acknowledging that Mary V. Bowes' 15-year-unrecorded deed to 126 C Street, N.W. was in the possession of Jacob Wall's estate.

13. That the Declaratory Judgment sought by the Murphy and Nelson *pro se* lawsuit is the *same as* that sought by them in Civil Action 1639-63 *as attorneys of Mary V. Bowes,* which Civil Action No. 1639-63 was dismissed by the District Court on January 20, 1964 without prejudice to reinstatement.

14. That Murphy and Nelson have never withdrawn as Mary V. Bowes' attorneys of record in Civil Action 1639-63.

IT IS OF RECORD IN THIS COURT—

15. That the respondent Mary V. Bowes and her attorney of record, Michael Ritz, Jr., have elected not to respond to this Petition for Writ of Certiorari.

16. That Eugene X. Murphy and Rex K. Nelson have elected not to deny that their suit is tainted by champerty, but to oppose the petition on the ground that the petitioners failed to raise and maintain the issue adequately in the proceedings below and that therefore, as a matter of *procedural* law, the question is not reviewable by this Court.

17. That the Memorandum filed in *Opposition* to the grant of the Petition for Certiorari in this cause fails to cite a single authority in support of its ventured conclusions.

The Conclusions of the Respondents Eugene X. Murphy and Rex K. Nelson Are Contrary to the Established Law

Noonan v. *Gilbert,* 63 Appeals D.C. 30, 68 Fed. 2nd, *775, 776:*

> "In the Norris Case (Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868;) the court said: 'Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.' 2 Wall. at page 55, 17 L. Ed. 868. The court further observed that 'the decisions have not turned upon the question, whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements.'
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> * * * *
>
> "That the contract in the present case was contingent in part is clear. While plaintiff was to receive $500 in any event, the payment of the additional $500 was contingent upon success. 'Every part of the consideration goes equally to the whole promise, and therefore, if any part of it is contrary to public policy, the whole promise falls.' Hazelton v. Sheckells, 202 U.S. 71, 78, 26 S. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217. 'That which is bad destroys that which is good, and they perish together.' Trist v. Child, 21 Wall. 441, 452, 22 L. Ed. 623.
>
> [4] Defendant reserved no exception to the action of the court in overruling his demurrer to the amended declaration, and, while he moved for

a directed verdict at the close of plaintiff's evidence, he failed to renew the motion at the close of all the evidence. But a court in the due administration of justice is bound to refuse its aid to enforce a contract that offends public policy. The invalidity of the contract may not be waived 'by any system of pleading, or even by the express stipulation of the parties.' The question 'was one which the court itself was bound to raise in the interest of the due administration of justice.' Oscanyan v. Winchester Repeating Arms Co., 103 U.S. 261, 267, 26 L. Ed. 539; Steele v. Drummond, 275 U.S. 199, 204, 48 S. Ct. 53, 72 L. Ed. 238.

Judgment reversed, with costs, and the cause remanded, with directions to enter judgment on the pleadings in accordance with this opinion.

Reversed and remanded."

Merlaud v. *Nat'l. Metro. Bank of Wash., D. C.*, 65 App. D.C. 385, 84 Fed. 2d, 238, *240:*

"By the common law prevailing in this District an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest in consideration of receiving a certain portion of what he may recover is unlawful and void for champerty. Peck v. Heurich, 167 U.S. 624, 17 S. Ct. 927, 930, 42 L. Ed. 302. In the instant case Merlaud was to receive repayment of any and all sums so paid by him from such sum as might be awarded the Hunters "from the said estate," and to be paid a commission "on the amount got in and recovered." As the court observed in the Heurich Case, "if this be not champerty, we fail to see wherein there can be champerty." The character of the enterprise on the part of Merlaud was plainly speculative, and the agreement he is seeking to enforce is champertous and void. A court in the due administration of justice is bound

to refuse its aid to enforce such a contract. Oscanyan v. Winchester Repeating Arms Co., 103 U.S. 261, 26 L. Ed. 539; Weil v. Neary, 278 U.S. 160, 49 S. Ct. 144, 145, 73 L. Ed. 243; Noonan v. Gilbert, 63 App. D.C. 30, 67 F.(2d) 775; Miles v. Mutual Reserve Fund Life Association, 108 Wis. 421, 84 N.W. 159. In the Weil Case the court said: 'Where a party seeks to enforce a contract, and it is found to be invalid because contrary to public policy, the usual result is that the court dismisses the action and leaves the parties as it finds them.'"

Weil v. *Neary*, 278 U.S. 160, *173, 174*, 40 S. Ct. 144, 145, 73 L. Ed. 243:

"The chief argument that is pressed upon us to declare the contract valid and to sustain the judgment based upon it, is the success with which the plaintiff is found to have worked out a useful settlement of the estate for the benefit of the creditors, and the absence of any finding or showing that there was actual fraud. But this is not a sufficient answer to the charge of illegality. The contract is contrary to public policy—plainly so. What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases. Even if the ultimate results in the management of the Thompson estate were good, that could be no excuse for a contract plainly illegal, because tending to produce the recognized abuses which follow fraud and disloyalty by agents and trustees. Enforcement of such contracts when actual evil does not follow would destroy the safeguards of the law and lessen the prevention of abuses. *Tool Co.* v. *Norris*, 2 Wall. 45; *Woodstock Iron Co.* v. *Richmond Extension Co.*, 129 U.S. 643; *Oscanyan* v. *Arms Co.*, 103 U.S. 261; *Meguire* v. *Corwine*, 101 U.S. 108; *Connors* v. *Connolly*, 86 Conn. 641; *Richardson* v. *Crandall*, 48 N.Y. 348; *Palmbaum* v.

Magulsky, 217 Mass. 306, 308. But we must not be understood as implying that no harm resulted to the Thompson estate or its creditors.

We conclude that the contract set up by Untermyer in the amended petition, framed to meet the evidence, is in violation of public policy and professional ethics. Such a transaction between counsel calls for judicial condemnation. This requires a reversal of the judgment of the court below."

Mud Valley Oil and Gas Co. v. *Hitchcock,* 40 Ind. Appeals 105; 81 N.E. 111, *112, 113:*

"Returning to the question for decision, it will be observed that maintenance is defined to be "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it. Anderson's Law Dictionary; 2 Chit. C. L. 233, note (a). Champerty is said to be 'a species of maintenance, being a bargain with the plaintiff or defendant to divide land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry the party suit at his own expense.' 2 Words & Phrases, 1047. It is 'the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it.' Anderson's Law Dictionary.

* * * *

"The case at bar is founded upon an executory contract which is said to be champertous. It expressly provides for the bringing of a suit to quiet title to the oil and gas covered by a lease theretofore executed. It further stipulates that such suit shall be carried on at the cost and expense of appellant. It stipulates for a division of the subject-matter in suit between the parties thereto in case the suit is successful. It has all the elements found

in the definition of champerty. Such contracts, called in question, even in the light of modern authority, will not be approved and enforced by the courts, unless shown to be above suspicion of a purpose of stirring up baseless strife and litigation, or of harassing others with suits, which otherwise would not be commenced, or for spoil or speculation. Peck v. Heurich, 167 U.S. 624, 630, 17 Sup. Ct. 927, 42 L. Ed. 302, and cases there cited; Belding v. Smythe, 138 Mass. 530; Lancy v. Havender, 146 Mass. 615, 16 N.E. 464; Scobey v. Ross, 13 Ind. 117; Coquillard's Adm'r v. Bearss, 21 Ind. 479, 83 Am. Dec. 362; Gilbert v. Holmes, 64 Ill. 548, 555, 556; Miller v. Larson, 19 Wis. 463.

* * * *

"It must be admitted that the facts here show that both parties to the contract had in mind the bringing of a suit with a view of pecuniary advantage to be derived from the very thing covered by the lease to be by that suit declared invalid, and to which appellant was an entire stranger, except the interest a successful suit, followed by a lease, would give it.

* * * *

"With all reasonable presumptions against the pleader, this case, as made by the complaint, does not, in our opinion, meet the requirements of the law requiring such transactions to be in good faith and free from oppression of the rights of another. From this conclusion, it follows that the contract in question was against sound public policy, and within the mischief to be guarded against in the administration of justice, and therefore unenforceable. In the disposition of this case, we are not unmindful of the legal principles supporting property rights, and the right of disposition of that which the owner may lawfully sell, together with the right of the purchaser to all remedies the law may afford to enable him to possess and enjoy the

subject of his purchase. These principles are based upon the policy of the law favoring peaceful and undisturbed enjoyment of property rights, and against agitation of such rights brought about by speculative litigation, as here exhibited by the complaint."

Miles v. *Mutual Reserve Fund Life Ass'n.*, 108 Wis. 421, 84 N.W. 159, *163, 164:*

"It is insisted by counsel for appellant that the trial court should have granted their motion for the direction of a verdict, if for no other reason, because the assignment of the alleged cause of action by Mrs. Toepel to her attorney, the respondent herein, pending the action to enforce it, was champertous and absolutely void. While the common-law doctrine as to champerty and maintenance is, in its main features, in force in this state (Barker v. Barker, 14 Wis. 131; Martin v. Veeder, 20 Wis. 466), it has not been applied heretofore, in any case in this court, to the purchase, by an attorney, of the claim of his client in a pending suit to be enforced in such suit at the expense and for the benefit of such attorney. The cases that have been decided here, where champerty was involved, were of the kind more generally met with, and with which the courts are more familiar, i.e. those where an attorney prosecutes a suit under a contract to pay the expenses of the litigation and to have an interest in the recovery. The real mischief which the law of champerty aims to prevent is that of encouraging litigation by persons who have no interest therein independent of that to be derived from carrying it on in whole or in part at his expense. That vice exists where an attorney purchases the claim of his client in suit with the intent to thereafter carry on the litigation at his own expense and for his own benefit, the same as where he agrees to carry on litigation at his own expense, in whole or in part, in the name of an-

other. Such a transaction is, on common-law principles, held to fall under the condemnation of the law of champerty and to be absolutely void. Arden v. Patterson, 5 Johns. Ch. 44; West v. Raymond, 21 Ind. 305; Greenman v. Cohee, 61 Ind. 201; Greenh. Pub. Pol. p. 437; Simpson v. Lamb, 40 Eng. Law & Eq. 59; s. c. 90 E. C. I. 84; Weeks, Attys. at Law, 552. In Simpson v. Lamb, it was said, in effect, that independent of any statute an attorney is, by relation to his client, incapacitated from purchasing of him anything in litigation of which the attorney has the management. "Considering," said the court, "the relation in which the attorney and client stand to each other, it would seem to be against the policy of the law to permit such a dealing by an attorney with the subject of a suit of which he has the conduct as the attorney, while the case is still undetermined by judgment, as that which is now in question before us.

"Thus stands the common-law rule as recognized by the courts of England and the courts of this country as well, where the common-law doctrine of champerty has been in the main adopted. Attorneys are officers of the court and charged as such with duties in the administration of justice entirely inconsistent with liberty to traffic in the subjects of the litigations of which they have the management. The law which condemns such transactions necessarily renders them absolutely void, and when a court is requested to refuse to aid in carrying out such a transaction by a motion to dismiss the action in which the champertous agreement is involved, the motion should be granted. Moreover, the court may properly act on its own motion in dismissing the action, upon the illegal character of the transaction involved becoming apparent. When a trial court is made fully acquainted with the fact that a suit on trial before it is tainted with champerty, a failure to refuse to proceed therein in effect makes such court a

party to the illegal transaction. It has been said that, 'when it appears satisfactorily to the court in proof that the suit is affected by champerty, it is its duty not to permit itself to become the organ or instrument of carrying out the champertous agreement, but it should repel the plaintiff and his suit.' Webb v. Armstrong, 24 Tenn. 379.

Champerty need not be pleaded and an issue need not be formed in regard thereto in order that it may be established and taken advantage of in the suit. It cannot be waived by any party to the litigation, nor stipulated out of the case. The taint of champerty does not affect the merits of a case at all, but affects the right of the champertor to use the court, regardless of the mere merits of his claim. * * *"

* * * *

CONCLUSION

In view of the foregoing and the election of the Respondent Mary V. Bowes to make no answer in this proceeding, the Petition for Writ of Certiorari should be granted and the cause should be remanded with instructions to vacate the Judgment, Opinion and Order of the District Court in this cause.

Respectfully submitted,

IRVIN LECHLITER
910 Seventeenth Street, N.W.
Washington, D. C. 20006
Attorney for Legal Integrity Preservation Society, Inc.

HENRY G. BARTSCH
3601 - 34th Street, N.W.
Washington, D. C. 20008
Pro Se

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